**From:** Tom Keiser
**To:** Microsoft ATR
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**Subject:** Microsoft Settlement

I am an attorney with some antitrust experience, and, for the past 15 years, a computer consultant. During that time, I have had a ringside seat to the anti-competitive behavior that led to this lawsuit, and also

to the fiasco that characterized the 1995 US v Microsoft settlement, in which that Consent Decree was sloppy, ambiguous, and was later turned to

Microsoft's advantage at every opportunity. Indeed, if it weren't for the DOJ's carelessness, and Microsoft's clever use of the 1995 settlement,
this trial and this settlement would have been largely unnecessary.

One of the only market forces that seems likely to create any kind of level playing field in the software industry is so-called open-source software, such as Linux, Apache, Samba, Sendmail, Perl, BSD and others. There is ample market evidence to suggest that this software is going to hold Microsoft to new standards of quality and pricing if it is allowed to survive and flourish.

And yet, after this lengthy trial, and all the evidence adduced, there is not one word or safety mechanism in the Proposed Final Judgment that would aid open-source software in this critical, pro-competitive role.

Instead, the Judgement is sprinkled with the terms "OEM", "firms", "business" and so on, none of which describe the open-source organizations which are not "businesses", "firms" or any of the other protected alphabet-soup entities. Rather, they are loose collections of programmers from all over the world, organized not in any legal or business entity, but over the internet to accomplish common programming goals. These programmers, much more than "internet service providers", "internet access providers" or "internet content providers" need to have

access to the secret keys needed to interface with Microsoft's proprietary software. Yet, all of the "providers" just mentioned are specifically protected in the Judgment and the open-source programmers are never even mentioned.

Moreover, access to these secrets is to be by "reasonable and non-discriminatory licenses" but no mechanism is provided for the open-source programmers to be eligible to obtain these licenses or, for that matter, to pay for them, at whatever "reasonable" rates turn out to

be.

Further, according to the DOJ's own interpretation of Section III.J.2.a,

> Subsection III.J.2.a. allows Microsoft to condition such disclosure or licensing on the recipient or licensee: ... (b) having a reasonable business need for the information for a planned or shipping product; (c) meeting reasonable and objective standards for the authenticity and viability of its business; ...

One must ask, especially in light of the calamitous 1995 DOJ settlement,

whether "having a reasonable business need for the information ..." or an "authentic[] and viab[le] business..." is not a deliberate trapdoor to eliminate open-source programmers as recipients of this information, as they create no "planned or shipping products" (in any commercial sense), and have no "business", authentic or valid.

As we have seen in the 1995 settlement, Microsoft will not hesitate to use this language as a club against its most formidable competition, and the DOJ may not even be aware of the implications of this language in this context..

In short, perhaps because of the urgency of tending to the problems of September 11th, perhaps out of technological ignorance, the DOJ is capping a successful trial and appeal with an ill-conceived settlement. One which not only has many holes and ambiguities, but which fails to promote the very goal of the Antitrust Division: encourage competition.

I urge the court to reject the Proposed Final Judgment, or any similar alternative, which fails to offer full protection to the survival of open-source software as the best deterrent to future Microsoft (or any other) monopolistic products and practices.

Respectfully yours,

Thomas E. Keiser